



Computer & Communications
Industry Association
Tech Advocacy Since 1972

May 27, 2021

Senate Deputy Majority Leader Gianaris
New York State House
172 State St.
Albany, NY 12210

RE: CCIA comments in opposition to S 933A, The Twenty-First Century Antitrust Act

Dear Senate Deputy Majority Leader Gianaris:

On behalf of the Computer & Communications Industry Association (CCIA),¹ I write in opposition to S 933A due to the chilling message this bill sends not only to companies operating within New York's technology sector, but to the state's business community as a whole.

CCIA advocates for sound competition policy and antitrust enforcement. Competition is a fundamental driver of innovation, particularly in the tech sector where the industry is characterized by rapid advances that are driven by dynamic competition. As a result of the competitive process, companies that offer better products and services often benefit from increased returns. This cycle incentivizes companies to continue investing in innovation that allows them to develop higher quality goods and services at a lower price — all to the benefit of consumers.

New York is at the forefront of tech innovation. Numerous indices cite New York City as one of the most innovative cities in the world. As a result, the technology sector is a key driver of the economy. The city's startup ecosystem alone is valued at \$147 billion.² As the state seeks to recuperate revenue lost as a result of the COVID-19 pandemic, it is imperative that New York attract investment, particularly within the rapidly growing tech industry, to help support ongoing recovery efforts. New York needs startups and growing companies to provide new jobs and tax revenue, but unfortunately S 933A sends a different message to companies seeking to do business in the state.

To this end, CCIA has identified the following concerns regarding the impact of S 933A on marketplace competition and the economy, and we encourage your office not to move forward with this legislation.

¹ CCIA is an international, not-for-profit trade association representing a broad cross section of communications and technology firms. For nearly fifty years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than \$100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. For more, visit www.ccianet.org.

² Startup Genome, "New York City", <https://startupgenome.com/ecosystems/new-york-city> (last visited Apr. 8, 2021).



1. Uncertainty surrounding the “abuse of dominance” standard creates compliance challenges that could deter businesses.

S 933A authorizes the Attorney General to “adopt, promulgate, amend, and repeal” guidance surrounding conduct that constitutes an “abuse of dominance”, for which there is no existing federal U.S. legal precedent. The failure to define key terminology upfront creates a moving target for enforcement and poses significantly greater legal uncertainty for companies operating in the state, which would have important implications for New York’s business environment.

Many entrepreneurs launch a business with the intention of eventually being acquired by another company. Ambiguity surrounding S 933A could undermine these efforts by creating an environment of uncertainty for both parties. Without adequate definitions, acquiring companies will have no method to determine if a proposed transaction or practice violates this standard, leaving them hesitant to acquire startups for fear that doing so may be deemed to meet the threshold for “abuse of dominance”. Conversely, firms encountering potentially objectionable behavior in the marketplace will have no certainty as to what practices are in fact impermissible.

In addition, the increased severity of penalties under S 933A would have a chilling effect on business investment. The bill raises monetary penalties for individual offenders from \$100,000 to \$1 million, and increases fines for corporations from \$1 million to \$100 million. The drastic increase in penalties alone sends a threatening message to businesses of all sizes seeking to engage in mergers and acquisitions.

Uncertainty surrounding business transactions and severe new penalties create a strong disincentive for companies to do business in the state. This is especially concerning during a time when many companies are exploring opportunities to relocate from New York to states with more business-friendly policies.³

2. Shifting toward an EU-based model is likely to hamper innovation

In order to guide enforcement related to the abuse of dominance standard, it is likely that the Attorney General will look to the European Union, where this standard is a cornerstone of EU competition law, and has led to overenforcement of competition for several decades. In the EU, a company is considered to hold a dominant market position with just 39% of a market share. In this position, they are required to abide by unique guidelines that restrict their ability to grow and thrive. In contrast, existing US Federal antitrust law, “dominance” requires a more meaningful market share, and the U.S. has seen rapid innovation and a thriving business environment.

³ Forbes, “Wall Street banks and tech companies are fleeing New York and California”, <https://www.forbes.com/sites/jackkelly/2020/12/14/wall-street-banks-and-tech-companies-are-fleeing-new-york-and-california/?sh=2da97b2a661a> (last visited Apr. 16, 2021).



Further, under the EU's abuse of dominance provisions, the ultimate goal of competition law is to maintain a competitive playing field. Alternatively, the US approach focuses on enhancing consumers' welfare, as opposed to protecting one competitor from another. The U.S. approach recognizes that when businesses battle it out for consumers' attention, the consumer wins. When competitors are induced not to compete too aggressively, consumers lose. Application of the European approach in New York will likely lead to decreased competition and innovation in the tech sector, to the detriment of both consumers and New York's innovation economy.

3. The proposed merger notification requirement creates unnecessary hurdles for companies.

S 933A introduces a unique pre-merger notification requirement which obligates companies to notify the Attorney General 60 days in advance of any transactions in the state through which the acquiring company would hold voting securities and assets of more than ten percent of the current thresholds specified by the FTC. In contrast, under existing federal law, merger transactions of \$92 million and higher are reportable to the FTC and DOJ under the federal Hart-Scott-Rodino Act (HSR).⁴ Notably, preliminary reporting by the FTC indicates that in 2020, more than two thousand transactions were flagged under the considerably higher HSR threshold.⁵ S 933A's merger notification requirement creates a duplicative review process that significantly expands the volume of reportable transactions compared to federal law. This requirement could result in delayed transactions⁶ and burden the AG's office with cases for review without any related benefit to consumers. These hurdles would contradict the state's "business friendly" message.

Across the country, jurisdictions are developing strategies to attract tech companies and expand employment opportunities in order to kickstart local economies. It is critical that lawmakers communicate their effort to adopt policies to help nurture small businesses to grow New York. Unfortunately, the message S 933A sends to the sector is quite the opposite.

4. Conflicting laws across jurisdictions pose barriers for business decisions

Businesses are increasingly operating across state lines and in doing so, are tasked with navigating complex compliance regulations. New rules posed by S 933A would only add to the complicated nature of already difficult considerations companies face when seeking to expand or move across state lines. Rather than a patchwork of legislation across jurisdictions, a uniform, evidence-based national approach is preferred.

⁴ 15 U.S.C. § 18a.

⁵ Federal Trade Commission, "Premerger Notification Program", <https://www.ftc.gov/enforcement/premerger-notification-program> (last visited Apr. 8, 2021).

⁶ Perry A. Lange, et al., "Developments in Antitrust Law: Keep an Eye on New York", WilmerHale (Mar. 5, 2021), *available at* https://www.wilmerhale.com/-/media/files/shared_content/editorial/publications/wh_publications/client_alert_pdfs/20210305-developments-in-antitrust-law-keep-an-eye-on-new-york.pdf, at 5.



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While CCIA's primary focus here is on promoting competition in the technology sector, our experience tells us that sweeping regulations may impact the business community writ large. We strongly advise against adopting broad new policy changes that will likely lead to unintended consequences for all business sectors. Your office should instead focus on adopting data-driven solutions to help attract business and spur economic growth that benefits all New Yorkers. We appreciate your consideration and stand ready to provide additional information and perspective as the Committee considers this bill.

Sincerely,

Matt Schruers
President
Computer & Communications Industry Association